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ARTICLE

WHOLESALE-LEVEL CLEMENCY: RECONCILING THE PARDON AND TAKE CARE CLAUSES

PAUL J. LARKIN*

Just as mercy is a classical moral virtue,[1] clemency is an ancient legal power.[2] Ordinarily, possessed by the chief executive of a nation or American state to correct errors in the operation of the criminal justice system, to forgive an offender's crime, or to reduce its punishment,[3] clemency is the earthly equivalent of the divine power to absolve a sinner of his or her

* John, Barbara & Victoria Rumpel Senior Legal Research Fellow, The Heritage Foundation. This Article is based on remarks that I made at a conference held by the *St. Thomas Law Journal* on March 18, 2022, entitled "*Clemency in 2022: The Power of the Pardon*." The views expressed are my own and should not be construed as representing any official position of The Heritage Foundation. I would like to thank John Malcolm and Meaghan McManus for helpful comments on an earlier iteration of this Article, as well as Rachel Barkow and Mark Osler for including me in numerous discussions of the clemency power that have immensely helped my understanding of it. Any errors are mine. In the interest of full disclosure, I was counsel for the United States in one of the cases listed below: *Herrera v. Collins*, 506 U.S. 390 (1993).

1. *See, e.g.*, REINHOLD NIEBUHR, JUSTICE AND MERCY (1974); JEFFRIE G. MURPHY, PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION 15 (2014). *See generally* Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 489 (2020).

2. The earliest known formal recognition of executive clemency lies in the Code of Hammurabi in Mesopotamia, one of the earliest legal codes. JEFFREY P. CROUCH, THE PRESIDENTIAL PARDON POWER 10–11 (2009); *see also* MELISSA BARDEN DOWLING, CLEMENCY AND CRUELTY IN THE ROMAN WORLD (2006); CHARLES L. GRISWOLD, ANCIENT FORGIVENESS: CLASSICAL, JUDAIC, AND CHRISTIAN (2011); Adriaan Lanni, *Transitional Justice in Ancient Athens: A Case Study*, 32 U. PA. J. INT'L. L. 551 (2010) (discussing the case study of the balance between retribution and forgiveness in ancient Athens); William W. Smithers, *The Use of the Pardoning Power*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 61, 62 (1914) (the clemency power "has never been overlooked in any scheme of government since the dawn of history").

3. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 411–12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.") (footnote omitted); *cf.* Dretke v. Haley, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law. The clemency power is designed to serve the same function. Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider. These mechanisms hold out the promise that mercy is not foreign to our system. The law must serve the cause of justice.") (citation omitted).

trespasses or grant some respite from eternal damnation.[4] The English Crown possessed that authority for a millennium[5] and delegated it to the proprietor, chief executive officer, or governor in each American colony.[6] Traditionally, the clemency power has been deemed a prerogative of the holder.[7] Today, the President of the United States, the chief executive of most foreign nations, and state governors may grant clemency (albeit, generally with some restrictions).[8] In fact, the Supreme Court of the United States has described that authority in such expansive terms as to make it one of the few powers a President may exercise that places him on a par with the English Crown.[9]

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4. *See, e.g.*, *Genesis* 4:13–15 (describing the "Mark of Cain"); *Psalms* 103:8 ("The Lord is merciful and gracious, slow to anger and abounding in steadfast love."); *Matthew* 5:7 ("Blessed are the merciful, for they will be shown mercy."); *id.* at 27:15–23 (describing Pontius Pilate's decision to pardon Barabbas during Passover); *Luke* 6:36 ("Be merciful, just as your Father is merciful."); LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS (2011); JONATHAN ROTHCHILD, MATTHEW MYER BOULTON & KEVIN JUNG, DOING JUSTICE TO MERCY: RELIGION, LAW, AND CRIMINAL JUSTICE 184 (2007); Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & POL. 131 (2019).

5. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *387–95; J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 430–49 (1986); J.H. Baker, *Criminal Courts and Procedure at Common Law 1550–1880*, *in* CRIME IN ENGLAND, 44–45 (J.S. Cockburn ed., 1977); DANIEL DEFOE, A HISTORY OF THE CLEMENCY OF OUR ENGLISH MONARCHS (Nabu Press 2013) (1717); NAOMI D. HURNARD, THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307 (1969); K.J. KESSELRING, MERCY AND AUTHORITY IN THE TUDOR STATE (2003); HELEN LACEY, THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH-CENTURY ENGLAND (2009); C.H. ROLPH, THE QUEEN'S PARDON (1978); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963); Thomas McSweeney, *The King's Courts and the King's Soul: Pardoning as Almsgiving in Medieval England*, 40 READING MEDIEVAL STUD. 159 (2014).

6. For example, the Virginia Charter of 1609 granted the governor "full and absolute Power and Authority to correct, punish, pardon, govern, and rule" all English subjects in the colony. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3800–01 (Francis Newton ed., 2018); *see also* DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776, at 127–32 (1976); HUGH RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 111–13 (1965); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 498–500 (1977).

7. *See*, *e.g.*, Larkin, *supra* note 1, at 454–56.

8. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); *see also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 54 (2002) (noting that, in eighteenth-century New York, more than half of the condemned prisoners received clemency); CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922); ANDREW NOVAK, COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE (2016); Leslie Sebba, *The Pardoning Power: A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83, 111 (1977). There are, however, various limitations. For example, the President may pardon someone only for a federal offense, leaving state governors the responsibility to make parallel decisions for state offenders. Moreover, a president cannot use the pardon power to prevent Congress from impeaching and removing a federal official. Paul J. Larkin, Jr., *The Legality of Presidential Self-Pardons*, 44 HARV. J.L. & PUB. POL'Y 763, 796–98 (2021).

9. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 266 (1974) (stating that the President's clemency power "flows from the Constitution alone, not from any legislative enactments, and that it cannot

Generally speaking, chief executives exercise their clemency power on a retail, case-by-case basis, granting specific relief to particular individuals.[10] Occasionally, however, Presidents have granted clemency on a wholesale basis to certain defined categories of offenders. One of the best-known examples was the decisions by Presidents Abraham Lincoln and Andrew Johnson to pardon the members of the Confederacy during and after the Civil War.[11] Other examples would arise if a President were to use the pardon or commutation approaches that I recommended in my remarks at the *St. Thomas Law Journal* 2022 symposium entitled *Clemency in 2022: The Power of the Pardon*.[12] There, I argued that the President could and should pardon, or erase any sentence of confinement, for anyone who was "morally innocent"—that is, anyone who was convicted of a "morally unjust" law, such as a strict liability offense.[13]

Those scenarios are what I will term wholesale-level clemency grants. Clemency awards like those raise issues not presented by individual grants to a particular John or Jane Doe. This Article will discuss what those issues are and will also explain why none of them pose an obstacle to the legality of a President's actions.[14]

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be modified, abridged, or diminished by the Congress."); United States v. Klein, 80 U.S. (13 Wall.) 128, 147–48 (1871) (describing the pardon power as being "without limit"); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866) ("A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) ("A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.").

10. *See, e.g.*, Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. Rev. 802, 861 (2015) ("[E]xecutive clemency provides a key mechanism for making sure laws do not extend to cases where it would be unjust and for providing needed individualized justice."); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 835 (2017) (stating that the clemency power enables a President to correct "individual cases of injustice").

11. *See infra* text accompanying note 29.

12. *See* Symposium, *Clemency in 2022: The Power of the Pardon*, 19 U. St. Thomas L.J. 515 (2023).

13. My remarks there drew on a proposal set forth in an earlier article of mine. *See* Paul J. Larkin, *Focusing Presidential Clemency Decision-Making*, 70 Buff. L. Rev. 1, 36–43, 72–73 (2022).

14. Two points are worth noting here. One is that emptying out death row would be a comparable wholesale exercise of clemency by a governor. That has happened on occasion. *See*, *e.g.*, Toney Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 U. Rich. L. Rev. 177, 177 (1993) ("I commuted the death sentences of all those on 'death row' in the New Mexico State Penitentiary. I have consistently opposed capital punishment as being inhumane, immoral, anti-God, and incompatible with an enlightened society."); Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. Rev. 1319 (2004); Symposium, *Closing Remarks by Former Illinois Governor George Ryan*, 53 DePaul L. Rev. 1719, 1727,

This Article will proceed as follows: Part I will discuss the Article II Pardon Clause. It will explain why that provision empowers a President to act upon a category of offenders and offenses rather than issue a lengthy series of pardons, commutations, or the like for each person who fits into one of those groups. Part II will turn to the Take Care Clause, which is also found in Article II. As relevant here, the principal concern that this clause poses is the prospect that category-wide grants of clemency with the practical effect of exonerating an entire set of offenders or nullifying an entire group of offenses is tantamount to a "suspension" of the law, in violation of the President's oath to execute the laws on the books. For several reasons, I conclude that, whatever might be the effect of a President's refusal to enforce an entire complement of laws, granting a pardon or commutation to a group of offenders is not a forbidden suspension. Finally, Part III assumes that wholesale-level grants of clemency are lawful and will consider whether they are a wise exercise of the President's power to extend mercy. In my opinion, they are in certain defined circumstances, but they would not be in all instances.

I. The Pardon Clause

In simple, straightforward terms, the clause provides that "[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."[15] A variety of considerations demonstrate that the Framers included the Pardon Clause of

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1733–34 (2004) (Governor George Ryan defended a mass commutation on the ground that the Illinois criminal justice system was so riddled with systemic flaws that he lacked confidence that only the guilty had been convicted of a capital offense); Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 Cath. U. L. Rev. 94 (1971). As long as a governor does not rest his decision on a forbidden ground such as race or sex, that action raises only state-law issues. *See* Rose v. Hodges, 423 U.S. 19, 21–22 (1975) ("Whether or not the sentences imposed upon respondents were subject to commutation by the Governor, and the extent of his authority under the circumstances of this case, are questions of Tennessee law which were resolved in favor of sustaining the action of the Governor by the Tennessee Court of Criminal Appeals in *Hodges v. State*, 491 S.W.2d (Tenn. Crim. App. 1972). It was not the province of a federal habeas court to reexamine these questions."). The other point is that there might be state-law limitations on gubernatorial clemency power that have no parallel in federal law. *See, e.g.*, Howell v. McAuliffe, 788 S.E.2d 706, 720–24 (Va. 2016) (ruling that governor's executive order granting voting rights to all formerly imprisoned felons violated the state constitutional provision against "suspension" of the law). Answering that question would require a fifty-state survey of state clemency law. That inquiry is beyond the scope of this Article.

15. U.S. Const. art. II, § 2, cl. 1. Interestingly, the text refers to only two of the five forms of clemency: pardons, which are exonerations, and reprieves, which are delays in the imposition of punishment. The clause does not refer to commutations, which are reductions in the severity of punishment; amnesties, which are large-scale pardons; or remittances, excusal of unpaid fines, or return of forfeited property. Yet, there is little doubt that the Pardon Clause also authorizes the President to grant those forms of relief under a greater-includes-the-lesser rationale. *See*, *e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) (ruling that the President may grant amnesty); *see* Ronald L. Goldfarb & Linda R. Singer, After Conviction 343 (1973) ("[P]resumably the [commutation] power is simply a lesser form of pardon. The power to commute sentences has been held to be implicit in the general grant of the pardoning power in the

Article II of the Constitution to empower the President to act like the English Crown.[16] Start with the fact that the Framers placed the Pardon Clause in the same Article II section where the Commander-in-Chief and Opinion Clauses are found, which grant the President the prerogative to command military operations and to ask his lieutenants for advice, respectively.[17] The text also specifies only two exceptions to the President's authority—one for state crimes and one for civil impeachments. Their specification strongly militates against judicial creation of additional exceptions.[18] Finally, the Framers knew English history and the common law.[19] Because the Crown was sovereign, the source of all law and authority in England,[20] the simple

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states whose constitutions do not mention commutation and in the federal system."); *infra* text accompanying notes 24–31.

16. The Framers said little at the Convention of 1787 about the Pardon Clause. *See* 2 The Records of the Federal Convention of 1787, at 419, 626 (Max Farrand ed., 1911); *see* Duker, *supra* note 6, at 501–06; Larkin, *supra* note 1, at 480–81. The two principal proposals for the new government—the Virginia Plan and the New Jersey Plan—each would have created the office of a chief executive, but neither one contained a provision authorizing that official to grant clemency. Alexander Hamilton and John Rutledge recommended granting the chief executive clemency power, and the Convention accepted their proposal. The Convention also rejected several proposals to modify the President's clemency authority—such as by requiring the Senate to concur in a pardon or making the crime of treason unpardonable—but the Convention rejected every such proposal. Perhaps that relative inattention was due to the fact that everyone at the Convention anticipated that the president of the Convention, George Washington, would become the first President of the United States, and no one wanted to impugn his integrity. Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 244 (1996).

17. The President is the supreme commander of military operations. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 26 (1942) ("The Constitution . . . invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."). The Opinion Clause gives the President comparable power to seek the advice of his lieutenants. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 672–75 (1996) (describing the clause's breadth). In fact, Alexander Hamilton found the Opinion Clause unnecessary since the ability to obtain advice from subordinates inheres in the authority granted to the President by the Article II, § 1, Executive Vesting Clause. *See* The Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.").

18. *See* Larkin, *supra* note 8, at 793–94.

19. *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015) ("The colonists brought the principles of Magna Carta with them to the New World . . . ."); Kerry v. Din, 576 U.S. 86, 91 (2015) (plurality opinion) ("Edward Coke['s] Institutes 'were read in the American Colonies by virtually every student of law . . . .'" (quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967)); District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008) (noting that Blackstone's "works constituted the preeminent authority on English law for the founding generation." (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

20. Which is why, under the common law, the Crown could do no wrong. *See*, *e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 458 (1793) ("The law, says Sir William Blackstone, ascribes to the King the attribute of sovereignty . . . no *suit* or action can be brought against the *King*, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power." (emphasis added) (quoting Blackstone, *supra* note 5, at *241–42)); *see* Blackstone, *supra* note 5, at *239, *244; Joseph Chitty, A Treatise on the Law of the Prerogative of the Crown: And the Relative Duties and Rights of the Subject 5 (1820).

but broad language used in the Pardon Clause reveals that the Framers effectively granted the President the same type of prerogative over error correction and mercy possessed by the Crown.[21]

Presidents have consistently read the Pardon Clause to vest in them a broad grant of clemency power, and that uniform interpretation carries considerable weight in constitutional interpretation.[22] Presidents have interpreted their Pardon Clause authority not only to permit them to correct mistakes or be merciful in particular cases of injustice but also to act on a wholesale basis by issuing an amnesty, a pardon with a category-wide effect.[23] They have granted amnesty in circumstances that generally involve the need to calm the citizenry after political turmoil has beset the republic to

21. *See, e.g.*, BLACKSTONE, *supra* note 5, at *394 ("[T]he king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend[,] and this by the common law."); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 233 (William S. Hein Co. 1986) (1642) (stating that the Crown could exercise that prerogative "either before attainder, sentence, or conviction, or after, [to] forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical"); Herrera v. Collins, 506 U.S. 390, 412 (1993); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871) (describing the President's clemency authority as being "without limit"); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866) (describing the pardon power as being "unlimited"; "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."); Larkin, *supra* note 8, at 793–95; *cf.* Cavazos v. Smith, 565 U.S. 1, 8–9 (2011) (in a state case, describing clemency as "a prerogative granted to executive authorities to help ensure that justice is tempered by mercy" and noting that "[i]t is not for the Judicial Branch to determine the standards for this discretion."); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 153 (2015) ("The absence of an explanation of the [commander-in-chief's] office's contours suggests that the Framers drew upon prevailing conceptions of what it meant to be a commander in chief.").

22. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (noting that "it is the duty of the judicial department—in a separation-of-powers case as in any other—to say what the law is," but adding that "it is equally true that the longstanding practice of the government . . . can inform our determination of what the law is") (citations and internal quotation omitted); Dames & Moore v. Regan, 453 U.S. 654, 679–80 (1981); Schick v. Reed, 419 U.S. 256, 266 (1974); The Pocket Veto Case, 279 U.S. 655, 688–89 (1929); *cf.* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . .").

23. *See, e.g.*, EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 181 (Randall W. Bland et al. eds., 5th rev. ed. 1984); CROUCH, *supra* note 2, at 40–45, 55–56; Proclamation by John Adams, President of the United States, *in* 1 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 293–94 (James D. Richardson ed., 1897); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1173 (2010) [hereinafter Love, *Twilight*] ("Presidents since Thomas Jefferson have issued post-war pardons to deserters and draft evaders . . . .") (footnote omitted); *id.* at 1173 n.16; Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89, 104 nn.79–80 (2015); Margaret Colgate Love, *Reinventing President's Pardon Power*, 20 FED. SENT'G REP. 5, 6, nn.6–8 (2007); P.S. Ruckman Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 453–56

bring disaffected or wayward groups back into the national fold.[24] For example, in 1795, George Washington granted amnesty to participants in the Whiskey Rebellion, an early revolt against federal taxes on whiskey.[25] John Adams did likewise for participants in a different tax dispute, the Fries Rebellion.[26] Our fourth President, James Madison, pardoned Jean Lafitte and his band of smugglers and pirates, the Baratarian Pirates, because they assisted Andrew Jackson during the battle of New Orleans in the War of 1812.[27] During the Civil War, Lincoln awarded amnesties to Confederate soldiers to encourage them to desert, while after the war, Andrew Johnson pardoned soldiers and officials in the Confederacy to bring its people back into the union.[28] Other Presidents have granted relief in similar circumstances.[29] History, therefore, reveals a longstanding presidential custom—adopted by the nation's earliest chief executives and continued late into the last century—that has gone unchallenged by Congress. That history is powerful evidence that this practice comfortably fits under the Article II Pardon Clause.[30]

Supreme Court decisions confirm the evident meaning of its terms. The Court has often reiterated that the text of the Pardon Clause empowers the President to grant federal offenders the same types of relief that a king

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(2016); Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139 (2000).

24. *See* GRAHAM G. DODDS, MASS PARDONS IN AMERICA: REBELLION, PRESIDENTIAL AMNESTY, AND RECONCILIATION 5 (2021) ("Because mass pardons are broader in scope [than case-specific ones] they are potentially more far reaching and significant than most pardons just for one person. Moreover, mass pardons offer presidents a potent means of bringing aggrieved and alienated groups back into the national community. They can enable the president to reconcile with large segments of society, put a problematic past behind the country, and move the country forward as a united nation. And they arguably constitute a distinct and important type of presidential action.").

25. CROUCH, *supra* note 2, at 55–56; DODDS, *supra* note 24, at 50–73.

26. DODDS, *supra* note 24, at 73–85.

27. Love, *Twilight*, *supra* note 23, at 1174 n.18.

28. DODDS, *supra* note 24, at 114–42; JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON, 1861–1898 (photo. reprt. 2018) (1953).

29. For example, James Buchanan pardoned Mormon insurrectionists in the Utah War of 1857–1858, while Benjamin Harrison and Grover Cleveland pardoned Mormon polygamists to help Utah along the path to statehood. *See* DODDS, *supra* note 24, at 86–113; Love, *Twilight*, *supra* note 23, at 1174 n.18. Harry Truman pardoned ex-convicts who had served loyally during World War II and the Korean War. *See* Proclamation No. 2676, 10 Fed. Reg. 15,409 (Dec. 29, 1945); *see also* Proclamation No. 3000, 17 Fed. Reg. 11,833 (Dec. 31, 1952); Love, *Twilight*, *supra* note 23, at 1173 n.16. Presidents Gerald Ford and Jimmy Carter granted relief to parties who, during the Vietnam War, evaded their selective service obligations to register for the draft. Proclamation No. 4,313, 39 Fed. Reg. 33,293, 33,293–95 (Sept. 17, 1974), *reprinted in* 88 Stat. 2504 (1974) (as amended by Proclamation No. 4,345, 40 Fed. Reg. 4,893 (Feb. 3, 1975), *reprinted in* 89 Stat. 1236 (1975)); Proclamation No. 4,483, 42 Fed. Reg. 4,391, 4,391–92 (Jan. 24, 1977), *reprinted in* 91 Stat. 1719 (1977) (pardoning persons who may have committed any offense between August 4, 1964, and March 28, 1973, in violation of the Military Selective Service Act); *see also* U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975); DODDS, *supra* note 24, at 143–78.

30. *See* Love, *Twilight*, *supra* note 23.

or queen could award his or her subjects.[31] Moreover, even though the Pardon Clause does not expressly refer to "amnesty"—viz., the wholesale-level grant of a pardon to a category of offenders—the Court has ruled that the President may grant clemency on a category-wide basis rather than pardon individuals one at a time.[32] As the Court has put it, "Pardon includes amnesty."[33] Any "distinction between them is one rather of philological interest than of legal importance."[34]

Accordingly, there should be no doubt that a President may pardon offenders wholesale or commute their sentences in the same manner. All the factors noted above—the simple but broad text of the Pardon Clause; the specification of only two exceptions to the President's authority, neither of which applies here; the longstanding uncontested practice by American Presidents of granting category-wide pardons; and the repeated, consistent Supreme Court approval of the President's authority to do so—should make it next to impossible to challenge the legality of a particular grant. Q.E.D.

Nonetheless, the question of the legality of mass clemency cannot be answered quite that easily. Consider the following: Start with the fact that, whatever some Presidents might believe, they are not kings.[35] They are not hereditary monarchs; Presidents must be elected to office, their tenure lasts but four years, and they can be re-elected for only one additional four-year

31. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 262 (1974) ("The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice."); United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit."); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) ("This power of the President is not subject to legislative control."); *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1855) ("At the time of our separation from Great Britain, that power had been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) ("As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.").

32. *See* Jenkins v. Collard, 145 U.S. 546, 560 (1892); Knote v. United States, 95 U.S. 149, 152–53 (1877); Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155 (1871); *Klein*, 80 U.S. at 147–48; United States v. Padelford, 76 U.S. (9 Wall.) 531, 542–43 (1869).

33. *Klein*, 80 U.S. at 147–48.

34. *Knote*, 95 U.S. at 152–53.

35. *See* Larkin, *supra* note 1, at 452–55. We have had forty-six Presidents, but only one king: a singer from Tupelo, Mississippi.

term.[36] They also are not the source of our law; the Constitution fills that role.[37] Atop that, Presidents have only those powers specified in the Constitution or granted to them by Congress.[38] Finally, what proves that no President is a monarch is that Congress can remove the President from office and forbid him from holding any other federal position.[39] As a result, the analogy between the English Crown and the American presidency is inexact at best.

That is true even with respect to the Pardon Clause. Other provisions of the Constitution can limit the President's Pardon Clause authority. For example, the President cannot remit a fine once funds have been paid into the federal treasury because only Congress can authorize any disbursement of federal money.[40] Moreover, Bill of Rights provisions, such as the First Amendment Free Exercise and Free Speech Clauses, prohibit the Executive Branch from discriminating against or burdening the free exercise of a person's chosen faith or political philosophy.[41] A President, therefore, could not condition the grant of clemency upon an offender's willingness to switch his faith or political allegiance to the President's own. The Fifth Amendment Due Process Clause imposes a similar restriction on the President when it comes to doling out clemency on a forbidden basis, such as race.[42] There might be other limitations as well.[43]

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36. U.S. CONST. art. II, § 1, cl. 1; *id.* amend. XII (revising the process for electing the President and Vice President); *id.* amend. XX (establishing that the Vice President shall become President if the President either dies before assuming office or dies during his elected term); *id.* amend. XXII (limiting the number of terms that anyone can serve as President).

37. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

38. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

39. U.S. CONST. art. II, § 4 ("The President, Vice President, and all other civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors."); *see also id.* art. I, § 2, cl. 4 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id.* § 3, cl. 6 ("The Senate shall have the sole Power to try all impeachments."); *id.* § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."). Yes, England also could remove its monarch, as Charles I painfully learned. PRAKASH, *supra* note 21 ("The English tried and executed Charles I, thus highlighting a somewhat underappreciated dimension of life tenure."). But I digress.

40. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequences of Appropriations made by Law[.]"); Knote v. United States, 95 U.S. 149, 154–55 (1877); United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1869); Larkin, *supra* note 1, at 468–69.

41. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421–33 (2022); Tandon v. Newsom, 141 S. Ct. 1294, 1296–98 (2021).

42. The text of the Fifth Amendment contains no Equal Protection Clause comparable to the one found in Section 1 of the Fourteenth Amendment. Nevertheless, the Supreme Court has read

Finally, however broad the clemency power might be, the Pardon Clause does not grant the President immunity from illegal awards of clemency. The only immunity that the Constitution bestows on any federal official is found in the Article I Speech or Debate Clause. It provides that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place."[44] The Framers modeled the clause on a component of the English Bill of Rights of 1689[45] that was designed to protect the members of Congress against the harassment that the Tudor kings had visited on members of Parliament during the seventeenth century.[46] To have that effect, the Speech or Debate Clause affords a member of Congress immunity from criminal prosecution or civil liability for oral or written remarks uttered in the House or Senate chamber.[47] The clause has a broad scope, the Supreme Court has taught us, and reaches "not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it.' "[48]

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such a limitation into the Due Process Clause on the ground that it prohibits arbitrary executive actions, and discrimination on the basis of race is just that. *See* Bolling v. Sharpe, 347 U.S. 479 (1954).

43. *See Ex parte* Wells, 59 U.S. (18 How.) 307, 312 (1855) (noting in dicta that the King could not use his clemency authority to repeal the common law crimes deemed malum in se, such as murder, rape, and robbery, because such an action "would be against reason and the common good, and therefore void," and cannot disturb the vested property rights of third parties).

44. U.S. CONST. art. I, § 6, cl. 1.

45. "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." BILL OF RIGHTS 1 WM. & M., SESS. 2, c. 2 (1689).

46. *See, e.g.*, United States v. Johnson, 383 U.S. 169, 180–82 (1966) ("[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary. In the notorious proceedings of King Charles I against Eliot, Hollis, and Valentine . . . the Crown was able to imprison members of Commons on charges of seditious libel and conspiracy to detain the Speaker in the chair to prevent adjournment. Even after the Restoration, as Holdsworth noted, the law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government. . . . It was not only fear of the executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs, levying punishment more to the wishes of the crown than to the gravity of the offence. . . . There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause. In scrutinizing this criminal prosecution, then, we look particularly to the prophylactic purposes of the clause.") (citations, footnotes, and punctuation omitted).

47. *See, e.g.*, United States v. Brewster, 408 U.S. 501, 528 (1972) (ruling that a former U.S. Senator can be convicted of accepting a bribe for performing an official act as long as the prosecution does not rely on the member's floor statements).

48. *Johnson*, 383 U.S. at 179 (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)) (punctuation omitted). Nonetheless, despite its breadth, the clause is not a complete "Get Out of Jail Free" card for members of Congress. They can be convicted of bribery or held liable for torts based on conduct they committed elsewhere while in office. *See Brewster*, 408 U.S. at 526 ("Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the

The Pardon Clause is not remotely similar to the Speech or Debate Clause. It does not grant the President immunity of any type; it merely vests broad power in the officeholder. Accordingly, the President can be held to account for any illegal uses of that authority. A President who sells pardons can be impeached, removed from office, and prosecuted for bribery.[49] So too can a President who uses his clemency power to commit a crime or cover one up by assuring someone that he will "take care of" any criminal liability that might attach to the commission of an offense.[50] The authority is broad, to be sure, but it is neither limitless nor a buckler against legitimate claims of misconduct.[51]

The bottom line is this: generally speaking, the President's clemency power is plenary. Neither Congress nor the courts may order him to exercise it, second-guess him when he does, or place hurdles in his way. Nonetheless, that power, however broad, is not an immunity from legal accountability for his actions. Other constitutional provisions limit a President's freedom of action.

One of them might be the companion Article II Take Care Clause. Found in the section following the Pardon Clause, the laconic Take Care Clause directs the President to "take Care that the Laws be faithfully exe-

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role of a legislator. It is not an act resulting from the nature, and in the execution, of the office. Nor is it a thing said or done by him, as a representative, in the exercise of the functions of that office, . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.") (citations and punctuation omitted); *see also*, Hutchinson v. Proxmire, 443 U.S. 111, 123–33 (1979) (ruling that a Senator may be held liable for defamatory remarks made in press releases and at a press conference); United States v. Murphy, 642 F.2d 699, 700 (2d Cir. 1980) (upholding the bribery conviction of a U.S. Senator over a Speech or Debate Clause claim); United States v. Myers, 635 F.2d 932, 937–39 (2d Cir. 1980) (same, in a case involving the bribery conviction of a U.S. Senator in the Abscam undercover operation).

49. U.S. CONST. art. II, § 4 ("The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); *id.* art. I, § 3, cl. 7 ("[T]he Party convicted [by the Senate] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); *cf.* United States v. Blanton, 719 F.2d 815, 821 (6th Cir. 1983) (en banc) (in a prosecution of former Tennessee Governor Leonard Ray Blanton for mail and tax fraud in connection with the issuance of retail liquor licenses, news reports said that the governor had also sold pardons).

50. *See* Larkin, *supra* note 1, at 556.

51. The Supreme Court has ruled that a President is absolutely immune from civil damages liability for official acts taken while he or she holds that office. *See* Nixon v. Fitzgerald, 457 U.S. 731, 744–58 (1982). By contrast, the Court has made it clear (albeit, without so holding, because no such case has yet come before the Court) that no President is immune from any criminal liability for acts taken before or during his or her tenure or for tort liability based on unofficial acts taken before assuming office. *See* Trump v. Vance, 140 S. Ct. 2412, 2421–25 (2020) (by implication); Clinton v. Jones, 520 U.S. 681, 692–710 (1997); United States v. Nixon, 418 U.S. 683, 707–16 (1974) (by implication).

cuted."[52] Scholars have devoted considerable attention to the meaning of that clause over the past decade or so.[53] The question here is how the Pardon and Take Care Clauses work together: are they complementary or disjointed, and, if the latter, which one governs when the two overlap?

The relationship between the Pardon and Take Care Clauses becomes an issue whenever a President exercises clemency on a wholesale basis. That is, would a President's decision to pardon an entire category of offenders or offenses have the effect of nullifying the laws that they broke, in violation of the presidential obligation to see to their enforcement?[54] If clemency has such a suspensory effect, must the President's clemency power give way to his law enforcement duty? If not, why not? The next part will address those issues.

II. The Take Care Clause and Its Relationship to the Pardon Clause

A. *The Take Care Clause*

Little discussed at the Convention of 1787[55] or in the *Federalist Papers*,[56] the Take Care Clause, according to the Supreme Court, serves a variety of purposes.[57] It identifies the President as the federal government's chief law enforcement officer.[58] It simultaneously reflects the assignment of

52. U.S. Const. art. II, § 3.

53. *See, e.g.*, Prakash, *supra* note 21; Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. Pa. L. Rev. 1753 (2016); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781 (2013); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835 (2016); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 49–52 (1994); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836 (2015); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019); Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 Whittier L. Rev. 1 (2009); Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259 (2009). The primary subject of that scholarship—whether the clause is an independent grant of authority or merely an obligation to enforce congressional laws—is not directly relevant to the issue discussed in this article, but the discussions offer invaluable insights into the meaning and reach of the Take Care Clause.

54. *See* Howell v. McAuliffe, 788 S.E.2d 706, 720–24 (Va. 2016) (ruling that governor's executive order granting voting rights to all formerly imprisoned felons violated the state constitutional provision against "suspension" of the law).

55. *See* 2 The Records of the Federal Convention of 1787, at 116 (Max Farrand ed., 1966); Lessig & Sunstein, *supra* note 53, at 64–70 (discussing the provenance of the clause at the Convention); Metzger, *supra* note 53, at 1877 & n.178.

56. *See* The Federalist Nos. 69 & 77 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Lessig & Sunstein, *supra* note 53, at 63 ("Hamilton devoted only a few lines in the Federalist Papers to discussion of this 'minor' executive power or responsibility.") (footnote omitted).

57. *See generally* Goldsmith & Manning, *supra* note 53, at 1836–38.

58. *See, e.g.*, Lujan v. Def. of Wildlife, 504 U.S. 555, 577 (1992) (stating that asserting Congress cannot "convert the undifferentiated public interest in executive officers' compliance

lawmaking powers to Congress by limiting the President's role to managing the execution of the laws.[59] It allows the President the discretion to decide the who, what, when, where, why, and how questions of law enforcement.[60] It also enables the President to remove insubordinate or incompetent federal officials who will not or cannot implement federal law.[61]

The Take Care Clause does not contain the term "suspension," but that term is found in the Article I Suspension Clause, which states as follows: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[62]

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with the law into an 'individual right' vindicable in the courts" because that would "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'"); Allen v. Wright, 468 U.S. 737, 761 (1984) ("The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize respondents' standing in this case without running afoul of that structural principle.") (citation omitted) (quoting U.S. CONST. art. II, § 3).

59. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (rejecting the argument that "the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution"); Metzger, *supra* note 53 (discussing the President's management responsibility in law enforcement).

60. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (concluding that the U.S. Attorney General and U.S. Attorneys charging have discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); United States v. Wayte, 470 U.S. 598, 607 (1985); Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) (discussing the Obama Administration's reliance on prosecutorial discretion to forbear prosecuting the federal cannabis laws). The reason is that:

> [T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Wayte, 470 U.S. at 607–08.

61. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); Myers v. United States, 272 U.S. 52, 117 (1926) ("As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication . . . must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.").

62. U.S. CONST. art. I, § 9, cl. 2. Written in the passive voice, the Suspension Clause does not identify *who* may not suspend the writ of habeas corpus. That is significant because Presidents

That clause would appear to be a promising place to turn for the meaning of a "suspension." Yet, whatever hope we might have that a clause in the Constitution specifically devoted to the issue of the "suspension" of the law might have for the issue before us becomes only marginally helpful once we consider the text of the Suspension Clause, its history, and the reason why it appears in our charter.

B. Suspension of the Law

Consider the text of the Suspension Clause. The "privilege of the Writ of Habeas Corpus" was a term well known at common law[63] (and therefore to the Framers[64]). Habeas corpus was an umbrella term used to refer to a fistful of *mesne* (or intermediate) writs that a court could issue for various purposes in the English criminal justice system.[65] The most important writ in that regard was the writ of *habeas corpus ad subjiciendum*, a judicial order directing a jailor to bring someone held in custody before the issuing judge so that the court could examine the legality of the detention, set a trial date, and decide whether to release the detainee on bail pending his trial.[66] Habeas corpus thereby enforced Article 39 of Magna Carta, which prohibited the Crown from holding subjects in custody except pursuant to the "law

have claimed the authority to suspend habeas corpus in the two scenarios where the clause permits executive detention. Lincoln, in particular, suspended the writ during the early days of the Civil War to avoid releasing John Merryman, a Maryland resident seized by military authorities in Maryland pursuant to Lincoln's order for his role in disrupting the flow of Union troops through that state. Supreme Court Chief Justice Roger Taney ruled that Lincoln could not suspend habeas corpus, see *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), but Lincoln refused to order the military to release Merryman. Instead, Lincoln asked Congress to suspend habeas corpus, which Congress did. *See* ANTHONY GREGORY, THE POWER OF HABEAS CORPUS IN AMERICA 92–105 (2013); JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF (2008); GEORGE CLARKE SELLERY, LINCOLN'S SUSPENSION OF HABEAS CORPUS AS VIEWED BY CONGRESS (2015) (1907); Sidney G. Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POL. SCI. Q. 457 (1888); Sherill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 97 (1958). There are, however, signals that the Clause allows only Congress to suspend habeas corpus. For example, the Suspension Clause is found in Section 9 of Article I, which is devoted to identifying restrictions on Congress's lawmaking power, not the President's authority. The resolution of that issue, however, is beyond the scope of this Article.

63. *See* David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 62–63 (2006) (describing the phrase "habeas corpus" as "a term familiar to all lawyers schooled on a heavy diet of Blackstone"). The Framers knew his work well. Alden v. Maine, 527 U.S. 706, 715 (1999) (quoted *supra* note 19).

64. *See supra* note 19 (collecting cases).

65. *See, e.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1566–68 (2021) (Gorsuch, J., concurring); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 97–99 (1807); BLACKSTONE, *supra* note 5, at *129–31.

66. *See, e.g.*, *Bollman*, 8 U.S. at 97–99; BLACKSTONE, *supra* note 5, at *129–31; Paul J. Larkin, *The Reasonableness of the "Reasonableness" Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996*, 72 CASE W. RSRV. L. REV. 669, 725 & n.234 (2022).

of the land,"[67] which meant "the Common Law, Statute Law, or Custome of England."[68] Article 39 adopted what we call "the rule of law"—viz., the principle that every government official, including the Crown, is subject to the law.[69] So read, the Article I Suspension Clause was designed to prevent executive detention—that is, confinement in the Tower of London or a local jail, not carried out in obedience to the judgment of a court, but for an illegitimate purpose, such as punishing someone out of favor with the king or local sheriff.[70] The clause denies Congress the power to suspend habeas corpus unless Congress finds that the republic is at peril of collapse due to foreign invasion or domestic insurrection. In those scenarios, the Suspension Clause has an important role to play in our constitutional scheme.

Nevertheless, given its focus on suspension of habeas corpus when the nation's continued existence is at peril, the clause is not directly relevant to the question of what discretion a President has to enforce a law, let alone whether a President can grant clemency on a wholesale basis. Yet, history is still somewhat helpful in answering that question. The concept of the "suspension of the law" also arose in a different context in English legal history,

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67. Chapter 39 provided that "no free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land." MAGNA CARTA 389 (J.C. Holt trans., 3d ed. 2015) (providing Latin original and English translation).

68. Ellis Sandoz, *Editor's Introduction: Fortescue, Coke, and Anglo-American Constitutionalism*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 16–17 (Ellis Sandoz ed., 1993) (quoting EDWARDO COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (London, E. & R. Brooke 1797) (1681)). Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. *See* COKE, *supra*, at 50. For a sampling of the numerous discussions of the Magna Carta's adoption and effect on American law, see DAVID CARPENTER, MAGNA CARTA (2015); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914).

69. *See, e.g.*, A.J. CARLYLE, POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES 53 (1941); 1 FREDERICK POLLOCK & FREDERICK W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 152 (2d ed. 1909); JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES (2004).

70. *See, e.g.*, WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS §§ 50–57, at 38–43 (Lawbook Exchange, 2003) (1886); CLARENCE CORY CRAWFORD, THE SUSPENSION OF THE HABEAS CORPUS ACT IN ENGLAND (2019) (1906); PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010). The federal government's post-9/11 detention of suspected terrorists has generated a fair amount of case law and literature discussing the Suspension Clause. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 732–33 (2008); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008); John Harrison, *The Original Meaning of the Habeas Corpus Suspension Clause, the Natural Right of Liberty, and Executive Detention*, 29 WM. & MARY BILL RTS. J. 649 (2021); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1; Shapiro, *supra* note 63; Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012). Their discussion of executive detention does not directly bear on the issue discussed in this Article.

a context that does bear on the relationship between the Pardon and Take Care Clauses.

Beginning during the reign of Henry III in the thirteenth century, kings claimed that, by virtue of the Crown's status as an absolute monarch, the font of English sovereignty,[71] a king had the inherent power to suspend or dispense with the operation of any act of Parliament as he saw fit.[72] For centuries, Parliament did not put up much of a fight with the Crown. In part, that was because Parliament likely feared losing a contest with a powerful king,[73] and in part, because English subjects generally did not object to having the Crown polish rough spots in Parliament's laws.[74] Parliament met rarely, its acts "might be mistaken or badly drawn," and "old habits of thought died hard," so "policy, mercy, or simple justice might direct a king to grant exceptions."[75]

Suspension first grew into a serious dispute while Elizabeth I was queen when she granted (or sold) commercial monopolies to favored parties.[76] The conflict became most acute when James II sought to appoint Catholics to positions in the government and the army in the teeth of a parliamentary law limiting those positions to members of the Church of England, "a policy calculated by everyone except James himself to arouse fear and hostility in his subjects' hearts."[77] When the controversy reached

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71. *See* James Daly, *The Idea of Absolute Monarchy in Seventeenth-Century England*, 21 HIST. J. 227 (1978).

72. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 65–73 (2014) (discussing the suspension controversy in Tudor England); Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack on the Royal Dispensing Power 1597–1689,* 29 AM. J. LEGAL HIST. 197 (1985); Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUDS. 434, 435 (1977) [hereinafter Edie, *End of Dispensing Power*] ("Its beginnings in England can be traced to the thirteenth century; Henry III was the first king to dispense, presumably in imitation of the Pope."). "Briefly, the power of dispense was the power to allow exceptions to the law, to permit what otherwise would be illegal, to grant a subject license to act as if the law dispensed did not exist." Edie, *End of Dispensing Power*, *supra*, at 435. The suspension power, however, was not limitless.

> In some cases these are rather obscure, but, essentially, the king could offer no exceptions to common law; he could dispense only with such law as he had had a part in making, statute or enacted law. He could not act against the public weal or safety nor license a public nuisance; he could permit no subject to act against the interest of another; he could forego or excuse a penalty only if it were due the crown. There were, thus, no licenses to murder, burn, or rob, to pollute streams, or to stop traffic on a roadway. But English kings did grant subjects license to import French wines, to worship God according to rites other than those of the Church of England, to transmute metals (if they could), to serve as sheriff for more than one year, to be pardoned for the crime of murder-all statute non obstante, notwithstanding.

Id.; *see also* HAMBURGER, *supra*, at 66.

73. Edie, *End of Dispensing Power*, *supra* note 72, at 435, 438.

74. Edie, *End of Dispensing Power*, *supra* note 72, at 435, 438.

75. Edie, *End of Dispensing Power*, *supra* note 72, at 435, 438.

76. HAMBURGER, *supra* note 72, at 380; Edie, *End of Dispensing Power*, *supra* note 72, at 436.

77. Edie, *End of Dispensing Power*, *supra* note 72, at 440; *see also* Kent et al., *supra* note 53, at 2157–58 ("Charles II provoked conflict with Parliament by purporting to suspend some of these laws, before backing down, but his brother, James II, a Catholic, chose outright confrontation. He

its boiling point, James II fled the country to escape the fate of his brother Charles I, who had been beheaded. Parliament invited William of Orange and Mary to assume the Crown on the condition that they disavow any power of suspension, which they did.[78] To secure its victory against descendants of William and Mary who might seek to restore a suspensory authority,[79] Parliament enacted the Bill of Rights of 1689, which barred the Crown from suspending the law without Parliament's authorization.[80] The result was that Parliament won the battle over what in Latin was known as *non obstante* authority—viz., the power to act in the teeth of a law of Parliament.[81]

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issued wide-ranging dispensations from the laws for certain favored persons, and then broad suspensions. In response, leading men in the kingdom invited the Protestant William of Orange from the Dutch Republic—a grandson of Charles I who was married to James II's daughter Mary (also a Protestant)—to invade England and assume the crown. James II fled.") (footnotes omitted).

78. Edie, *End of Dispensing Power*, *supra* note 72, at 440; Kent et al., *supra* note 53, at 2158 ("As part of the Glorious Revolution, Parliament enacted a new coronation oath. As this statute recalled, previous coronation oaths had "been framed in doubtful Words and Expressions" concerning whether the monarch would strictly maintain all "ancient Laws and Constitutions," or only those with which he or she agreed. To counter this evasion, Parliament specified a new, clearer oath, through which William and Mary and subsequent monarchs would be required to pledge as follows: 'Will You solemnly Promise and Swear to Govern the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parliament Agreed on and the Laws and Customs of the same? . . . I solemnly Promise so to doe.' This oath to govern according to law dovetailed with the statement in the Bill of Rights, also adopted as part of the Glorious Revolution settlement between Parliament and the new king and queen, that the monarchy had no prerogative to suspend the laws or dispense with the application of law to any individual. Later, foundational statutes reiterated this commitment to parliamentary supremacy.") (footnotes omitted; language modernized).

79. Edie, *End of Dispensing Power*, *supra* note 72, at 449–50 ("Englishmen knew the danger of the dispensing power. King William might be trusted, but the future could not: security against it was required. . . . Once the Revolution had begun, it had to be carried to its conclusion. . . . It was, really, a question of responsibility. If the Revolution marked the triumph of law, it marked too the end of the dispensing power. Non obstante had been necessary because statutes were outdated, ill-drawn, ill-advised, or in the Lords' own word, useless. But it was no longer possible to trust the king to remedy the defects. Convenient, expedient, the non obstante might be, but dangerous too, the Lords knew. Parliament itself must assume responsibility for the laws it made. Defective laws must be redrawn, useless ones repealed. Parliament met often now; it could be done, and was. Through the 1690s old laws were brought up to date and, when necessary, rewritten. There could be no other way. The Commons understood this and so, in the end, did the Lords.") (footnote omitted).

80. *See* English Bill of Rights 1689, 1 Wm. & M., sess. 2, c. 2, https://avalon.law.yale.edu/17th_century/england.asp (criticizing the Crown for "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament"); *id.* (stating that "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal."); *id.* (stating that "the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late is illegal").

81. *See* Kent et al., *supra* note 53, at 2159; Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1425 (1999) (noting that in the Glorious Revolution, the English Bill of Rights "declared illegal certain actions of the crown, including its dispensing with laws"). At least one commentator believes right triumphed. As Carolyn Edie put it:

> The dispensing power in James II's hands had proved a dangerous thing indeed. The Catholic king had granted dispensations freely, setting aside statutes to bring Catholics

C. *Suspension Versus Discretionary Enforcement of the Law*

Did the Article II Take Care Clause incorporate a suspensory limitation on presidential power?[82] Unlike the restriction that the English Bill of Rights expressly imposed on the Crown, the text of the Take Care Clause does not in terms deny the President a suspension power. That would appear to foreclose the argument that the Take Care Clause forbids the suspension of the law. Nonetheless, there is a powerful case that such a ban is implicit in the clause's command that the President "*shall* take Care that the Laws be faithfully executed," as several commentators have concluded.[83]

Constitutional history, text, and reason make a strong case for the absence of a suspension power.[84] American settlers brought the common law with them to the New World.[85] By the time of the Convention of 1787, the ban on the Crown's suspension of Parliamentary laws adopted in the English Bill of Rights of 1689 had become an integral and settled feature of

> into his service and, presumably, into his designs for absolutism. He had used his power to defy the law and, more particularly, to defy the Lords and Commons in parliament who made it. The rule of law could not be assured, nor the supremacy of parliament, while the king had a power to grant dispensations at his will and whim. The abolition of the royal *non obstante* was essential to the accomplishment and to the security of the [Glorious] Revolution."

Edie, *End of Dispensing Power*, *supra* note 72, at 434.

82. *See, e.g.*, HAMBURGER, *supra* note 72, at 65–73 (discussing the background to the Take Care Clause).

83. *See, e.g.*, HAMBURGER, *supra* note 72, at 65–73; Bellia, *supra* note 53, at 1771–76, 1788 ("Suspending or dispensing with a statute is outside the bounds of good faith."); Bellia, *supra* note 53, at 1793 ("It should be obvious that a power to decline to enforce the law for any reason quickly collapses into a suspension power. That is, if exercised across a class of cases, the power to decline to enforce the law reflects a narrowing of the operative statute."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583–84 ("The Take Care Clause perhaps limits and defines the Executive Power Clause's grant of executive power by making it clear that the President has no royal prerogative to suspend statutes.") (footnote omitted); *id.* at 603 ("The Take Care Clause underscores the President's preeminent role in the execution of federal law; the Clause may also command "faithful" presidential execution and thus preclude any imagined presidential authority to suspend laws.") (1994); Delahunty & Yoo, *supra* note 53, at 803–04 ("The connection between the executive duty to enforce the law and the absence of any power to dispense with the law is conceptual and analytical, not merely historical. And it is scarcely conceivable that a federal Executive modeled on the Governor of New York should have been vested with a power that had long since been denied to the English King.") (footnotes omitted); Kent et al., *supra* note 53, at 2125; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1313 (1996) ("[T]he most important, if not the sole, aspect of [the Take Care Clause] is to make clear that '[t]he executive Power' does not include a power analogous to a royal prerogative of suspension."); Metzger, *supra* note 53, at 1878 ("General agreement exists . . . that the [Take Care] Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power.").

84. *See, e.g.*, Bellia, *supra* note 53, at 1793.

85. *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) (quoted *supra* note 19); Kansas v. Colorado, 206 U.S. 46, 94 (1907); Hurtado v. California, 110 U.S. 516, 530 (1884) ("The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history[.]"); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30–31 (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 299–300 (1998).

the English separation of powers doctrine.[86] In addition, six states carried that principle forward by including in their own constitutions a provision authorizing the *legislature* but *not* the *chief executive* to suspend the law.[87] That is the background against which the Framers drafted Article II.

Article II created the office of the President of the United States, but it did not make the officeholder a king, nor did it resurrect any suspension or dispensation authority for the new President.[88] The Constitution gave a President only a limited role in the lawmaking process.[89] He or she can veto any bill passed by both chambers[90] and "recommend" to Congress for its "[c]onsideration such measures as he shall judge necessary and expedient."[91] That is it. The Convention delegates voted down proposals to make the President's veto absolute and to give the President a limited suspension power.[92]

Where does that leave us? By 1787, it had been settled law in England for nearly a century that the Crown could not suspend the operation of a law. Numerous states prohibited suspensions in their state constitutions.

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86. *See* W.B. Gwyn, The Meaning of the Separation of Powers 30 (1965) (noting that by the end of the seventeenth century, English law no longer recognized the Crown's suspension or dispensation authority); Kent et al., *supra* note 53, at 2125 ("These early decisions [at the Convention of 1787 to deny the President an absolute veto or limited suspension power] make it unlikely that the later additions of the Take Care Clause and the oath could have been understood as resurrecting any kind of a suspension power, a power withheld from the monarchy for a century by the time of the Convention.").

87. *See, e.g.*, Bellia, *supra* note 53, at 1774–75 & n.123; Steven G. Calabresi, Sarah E. Agudo, & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1534 (2012); Delahunty & Yoo, *supra* note 53, at 803, n.129; Va. Const. of 1776, Bill of Rights, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."); Kent et al., *supra* note 53, at 2173–76.

88. *See* Larkin, *supra* note 1, at 453–54 ("Whatever else can be said about that position, it is not a kingship. King George III was a hereditary monarch. The President is not; he holds an elected office for four years. Before the advent of the rule of law and the rise of Parliament, the English crown was the complete sovereign; whoever sat on the throne held the power of life and death over everyone in the nation. The President's powers are specified and few. . . . Atop all that, Article II empowers Congress to remove the President from office for specified types of misconduct. That provision alone makes it evident that the President is not a monarch.") (footnotes omitted).

89. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States * * *.' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.' ").

90. U.S. Const. art. I, § 7, cls. 2–3.

91. U.S. Const. art. II, § 3.

92. *See* Bellia, *supra* note 53, at 1775.

The Convention delegates carefully constructed separate branches of government with distinct legislative and executive powers. They also rejected suggestions that the President should have an absolute veto or be able to temporarily suspend the laws.[93] To ensure that the President carries out his or her executive responsibilities, the text of the Take Care Clause expressly imposes a duty on the officeholder to implement acts of Congress. Under these circumstances, the absence of an express ban on suspension of the laws is not dispositive. The Take Care Clause reflects the Framers' decision to incorporate into the Constitution the separation of powers principle establishing the respective powers and duties of the English Parliament and Crown that emerged from the Glorious Revolution, which put an end to the Crown's ability to dismiss an act of Parliament.[94] As Justice Hugo Black later summarized in the *Steel Seizure Case*, "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[95] That refutation also bars the conclusion that the President may suspend the operation of the law.[96]

Several Supreme Court decisions support the conclusion that the President may not suspend the laws. Start with *Kendall v. United States ex rel. Stokes*.[97] William Stokes and others had entered into a contract with then-U.S. Postmaster General William Barry to transport the mail. When Barry's successor, Amos Kendall, assumed office, he re-examined that contract and disallowed some of the negotiated payments. After some lengthy, complicated, and (fortunately for our purposes) irrelevant preliminary proceedings,[98] Stokes and his partners sought a writ of mandamus ordering Kendall to pay the agreed-upon amount. In the Supreme Court, Kendall suggested that only the President could order him to pay Stokes the requested money, and the President had discretion to refuse to make that payment as part of

93. *See id.* at 1775, nn.125–29 (collecting authorities).

94. *See, e.g.*, Kent et al., *supra* note 53, at 2149–59.

95. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); *see also, e.g.*, Bellia, *supra* note 53, at 1775; Delahunty & Yoo, *supra* note 53, at 803–04.

96. *See, e.g.*, Kent et al., *supra* note 53, at 2184 ("If the framers had wanted an explicit command to always abide by Congress's laws, they had the language of these coronation oaths available. But the absence of such language in Article II probably should not be viewed as surprising or as giving rise to a negative inference in favor of a President's freedom to defy statutory law for policy reasons. That a chief magistrate of a republican government lacked authority to dispense with the application of law to particular individuals, or to suspend law entirely, was so thoroughly settled in Anglo-American constitutional law by the Glorious Revolution and its aftermath that the principle most likely would have gone without saying. Only a few of the early U.S. state constitutions expressly barred suspensions and dispensations, but that was not understood in the other states to leave the governors free to do so. And in any event, the faithful execution language conveyed this idea.") (footnotes omitted).

97. 37 U.S. 524 (1838). The Supreme Court was not the first court to reject a presidential suspension power. *See* United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.").

98. *Kendall*, 37 U.S. at 527–609.

his Take Care Clause power.[99] The Court gave that suggestion the back of the hand and also refused to believe that the President had, in fact, asserted any such novel power:

> It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.
>
> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. But although the argument necessarily leads to such a result, we do not perceive from the case that any such power has been claimed by the President.[100]

More than a century later, the Court reached the same conclusion in far more compelling circumstances than a simple breach-of-contract case. In *Youngstown Sheet & Tube Co. v. Sawyer*, also known as the *Steel Seizure Case*, the Court confronted President Harry Truman's claim that he had the authority under the Take Care Clause to order steelworkers to end their strike and return to work in the defense industries because the nation was then engaged in a military conflict with North Korea.[101] One of the President's asserted bases for authority was the Take Care Clause. Writing for the Court, Justice Hugo Black rejected that argument as being inconsistent with the distinction between the Article I lawmaking and Article II law-enforcing authorities:

> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that

99. *Id.* at 612–13.
100. *Id.*
101. 343 U.S. 579 (1952).

> "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[102]

Two other decisions are relevant. The year after the *Steel Seizure Case*, the Court made clear in *District of Columbia v. John R. Thompson Co.* that a President's refusal to enforce an act of Congress does not rob that law of its vitality.[103] There is no desuetude doctrine in federal law, the Court reasoned, so a President's choice to ignore a statute does not weaken its force, regardless of how much time goes by.[104] Three-plus decades later, in 1998, the Court decided *Clinton v. New York*.[105] There, the Court held unconstitutional the Line Item Veto Act, which authorized the President to erase provisions of an already passed and signed appropriation act. As the Court explained, once Congress passes a law and the President signs it, only Congress can repeal or revise it, and it may do so only by a new act of Congress signed by the President (or repassed over his veto).[106]

The upshot of those decisions is this: unless Congress dictates a result that is itself unconstitutional,[107] the President cannot nullify a law by refusing to enforce it. On the contrary, his refusal to implement a law would violate his legal and fiduciary responsibility to see to the enforcement of acts of Congress under the Article II Presidential Oath and Take Care Clauses.[108] Moreover, an implicit refusal to enforce a statute does not

102. *Id.* at 587–88 (footnote omitted); *see also id.* at 610 (Frankfurter, J., concurring) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." (quoting Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)); *id.* at 633 (Douglas, J., concurring) (stating that any authority conferred by the Take Care Clause "starts and ends with the laws Congress has enacted"); *id.* at 646 (Jackson, J., concurring) (noting that the Take Care Clause confers on the President "a governmental authority that reaches so far as there is law," thereby "signify[ing] . . . that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.").

103. 346 U.S. 100, 113–14 (1953).

104. *Id.* ("The failure of the executive branch to enforce a law does not result in its modification or repeal. The repeal of laws is as much a legislative function as their enactment.") (citations and footnote omitted); *cf. Ex parte* United States, 242 U.S. 27, 42 (1916) ("[T]he possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.").

105. 524 U.S. 417 (1998).

106. *Id.* at 442–47.

107. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1 (2015) (ruling that an act of Congress prohibiting the President from deeming Jerusalem as the capital of Israel is unconstitutional as violating the President's authority under the Reception Clause, U.S. CONST. art. II, § 3).

108. U.S. CONST. art. II, § 1, cl. 6 (prescribing the presidential oath of office); *id.* § 3 ("[The President] . . . shall receive Ambassadors and other public Ministers. . . .").

weaken the statute's validity because the President cannot unmake a law except by persuading Congress to repeal it. As such, the Take Care Clause implicitly carries forward the resolution of the seventeenth-century conflict between the Crown and Parliament, codified in the English Bill of Rights of 1689, that the chief executive cannot suspend the law.[109]

Does that mean a President must enforce every law in every instance against offenders? Is any exercise of discretion to investigate or charge someone with a crime a suspension of the law? The answer is, "No." The President may not refuse to enforce an act of Congress regardless of the circumstances because doing so would be tantamount to the exercise of a second veto that the President does not possess.[110] But the President may exercise good faith discretion in deciding when, where, how, and against whom to enforce a law. The good faith requirement stems from the President's fiduciary duty to the nation that undergirds his responsibilities as the nation's chief executive.[111] The ability to exercise discretion results from several factors that compel him to be selective as to which particular enforcement actions to bring.

One reason that the President has law enforcement discretion is that he may not spend money that Congress has not authorized and appropriated. The Article I Appropriations Clause gives Congress plenary authority to dispense federal funds,[112] and Congress does not give the President a credit card to "buy now, pay later" whatever widgets or services the President believes he needs but lacks current funds to purchase.[113] The consequence is that the President, acting through the U.S. Attorney General, must decide

109. *See, e.g.*, Kent et al., *supra* note 53, at 2187 ("As the Supreme Court has acknowledged, quoting the Take Care Clause, '[u]nder our system of government, Congress makes laws and the President . . . "faithfully execute[s]" them.' The Faithful Execution Clauses thus underscore that '[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts.' ") (footnotes and citation omitted).

110. *See, e.g.*, Bellia, *supra* note 53, at 1772–73.

111. *See* U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.' "); GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); Goldsmith & Manning, *supra* note 53, at 1857–58 (discussing the possible fiduciary obligation that the Take Care Clause imposes on the President).

112. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."); *see* Paul J. Larkin, Jr. & Zack Smith, *"Brother, Can You Spare a Million Dollars?": Resurrecting the Justice Department's "Slush Fund"*, 19 GEO. J.L. & PUB. POL'Y 447, 455–58 (2021) (explaining that the appropriation of federal funds is a congressional prerogative).

113. *See* THE FEDERALIST NO. 58, *supra* note 17, at 356–57 (James Madison); Abner Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 1–4 (1986); Larkin & Smith, *supra* note 112, at 449, 455–58, 466, nn.92–94; Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352–53 (1988). The Antideficiency Act, 31 U.S.C. §§ 1341–1342 & 1350, enforces that clause by prohibiting the U.S. Attorney General from spending funds in excess of the amount Congress has appropriated. *See* Larkin & Smith, *supra* note 112, at 466, 465 nn.92–94.

how to wisely spend the funds appropriated for the Justice Department. In turn, that means that federal law enforcement officials must select which cases to bring to maximize the effect of criminal law because the Justice Department lacks the funds, personnel, and physical assets to investigate and prosecute every suspected or provable crime.[114] It makes no sense to deem the federal government's decision to comply with the limitations imposed by the Article I Appropriations Clause and the annual Department of Justice appropriations bill an unlawful "suspension" of the law.

A second, related reason is that the explosion of federal criminal laws since the nation's founding forces the President to decide how to allocate his limited enforcement funds to best advance the nation's interests. The Framers feared that a large-scale criminal code would threaten individual liberty,[115] and the early Congresses kept it small.[116] It adopted roughly thirty federal offenses, ones deemed necessary for the effective operation of the new republic.[117] Over time, Congress added new criminal laws as the Supreme Court expanded the reach of Congress's authority over tax-related activities and the regulation of interstate commerce.[118] In the last quarter of the twentieth century, however, the number of new federal criminal laws skyrocketed. For much of the period since the 1970s, Congress became an "offense factor[y]," churning out new criminal statutes at a rate of more than one statute per week from 2000 through 2007.[119] Indeed, counting the number of federal crimes is no mean feat. The American Bar Association and the Department of Justice both failed in the effort.[120] As the late Professor Bill Stuntz wrote, "Because criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators. Broad criminal law thus means that the law as enforced will differ from the law on

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114. *See* 28 U.S.C. §§ 517–519 (authorizing the Attorney General to manage the federal government's criminal and civil litigation); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985); United States v. Wayte, 470 U.S. 598, 607–08 (1985) (discussing the need for judicial deference to prosecutorial decision-making).

115. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 207 (3d ed. 2005).

116. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 725–26 (2013).

117. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790) (outlawing crimes such as treason and misprision of treason; murder, robbery, larceny, and receipt of stolen property on federal property or the high seas; perjury, bribery of federal judges; and forgery of federal securities).

118. *See, e.g.*, Paul J. Larkin, *Constitutional Challenges to the OSHA COVID-19 Vaccination Mandate*, 20 GEO. J.L. & PUB. POL'Y 367, 371 & nn.25–26 (2022) (collecting decisions and commentary to that effect); Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 337–38 & nn.188–92 (2013).

119. DOUGLAS HUSAK, OVERCRIMINALIZATION 34 (2008).

120. A colleague of mine and other researchers have succeeded where the ABA and Justice Department failed. *See* GIANCARLO CANAPARO, PATRICK A. MCLAUGHLIN, JONATHAN NELSON & LIYA PALAGASHVILI, COUNT THE CODE: QUANTIFYING FEDERALIZATION OF CRIMINAL STATUTES, THE HERITAGE FOUND., SPECIAL REPORT NO. 251, at 1 (Jan. 7, 2022) (finding 1,510 statutes that create at least one federal offense and at least 5,199 crimes as of 2019).

the books."[121] Enforcing every federal offense, therefore, is impossible, and it makes no sense to construe the Constitution to require the impossible. Some good faith enforcement discretion is inevitable.

A third reason why the President has law enforcement discretion is that some offenses cannot be investigated without a federal law enforcement officer becoming involved with suspected offenders and committing criminal acts. Vice crimes, criminal conspiracies, and organized criminal enterprises pose special problems for law enforcement authorities that were unknown in 1787. Vice offenses are materially different from common law crimes such as murder, rape, robbery, or burglary. The latter have distinctly identifiable, injured victims. By contrast, vice crimes are often (albeit mistakenly) called "victimless crimes" because the parties commit those offenses by mutual agreement. Accordingly, there generally is no one to report the transfer of a controlled substance (like heroin) from a willing seller to a willing buyer. Moreover, secrecy is essential to the successful execution of conspiracies and ongoing criminal enterprises, so those crimes make it difficult for law enforcement to disrupt their schemes without being privy to gang members' planning sessions. Law enforcement has sought to prevent those crimes from occurring (or to apprehend the responsible parties) via the modern-day investigatory practice of using undercover agents. That is particularly necessary in the case of drug or organized criminal enterprises.[122] As part of their responsibility "to protect and serve," senior law enforcement officials can, and often do, authorize federal agents or state and local police officers to commit lesser crimes (such as possessing contraband) when engaged in legitimate law enforcement operations (such as infiltrating a drug trafficking organization) in order to identify and apprehend individuals who commit greater crimes (such as racketeering).[123] That practice is widely used today by law enforcement agencies of all shapes and sizes.[124] Yet, it was unknown to the English criminal law in the seventeenth century (as was the existence of police departments), when the English Crown's suspension of the law prompted Parliament to forbid the king from

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121. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001).

122. *See, e.g.*, MICHAEL MCGOWAN & RALPH PEZZULLO, GHOST: MY THIRTY YEARS AS AN FBI UNDERCOVER AGENT (2018); JOSEPH D. PISTONE, DONNIE BRASCO: MY UNDERCOVER LIFE IN THE MAFIA (1988).

123. *See, e.g.*, U.S. DEP'T OF JUST., UNDERCOVER AND SENSITIVE OPERATIONS UNIT, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS § IV.H. (2017); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 156 (2009) ("Covert policing necessarily involves deception, which in turn often leads to participation in activity that appears to be criminal. In undercover operations, the police have introduced drugs into prison, undertaken assignments from Latin American drug cartels to launder money, established fencing businesses that paid cash for stolen goods and for 'referrals,' printed counterfeit bills, and committed perjury, to cite a few examples.") (footnotes omitted).

124. *See* Joh, *supra* note 123, at 163. It also brings to mind President Monroe's decision to pardon the Barbary Pirates because of their assistance to General Jackson at the Battle of New Orleans. *See supra* text accompanying note 27.

refusing to execute the law without Parliament's authorization. The type of crimes for which undercover operations are necessary (such as the smuggling of illegal drugs) had not yet become a problem and the type of felons responsible for those offenses (such as leaders of transnational criminal organizations) had not yet been born.

There is no reason to believe that the Supreme Court would treat this practice as an unlawful suspension of the law, in violation of the President's Take Care Clause duties. Why? Because the only way to enable an undercover officer to infiltrate a drug ring, for example, might be for him or her to pose as a buyer and make numerous purchases to establish the agent's bona fides as a dealer. The government, therefore, must choose between allowing an agent to purchase and possess an unlawful controlled substance, such as heroin, and disrupting a heroin distribution network. That tradeoff does not implicate the separation of powers concerns underlying a ban on the President's suspension of the law. That type of tradeoff also is not akin to the suspensions of the law that members of a seventeenth-century English Parliament or the eighteenth-century American Founders could have imagined.

True, the Supreme Court has not specifically answered the question whether authorizing a law enforcement officer to commit crimes violates the Take Care Clause, but the Court has considered numerous cases involving the use of undercover officers, and it has never suggested that this practice "suspends" the operation of the federal criminal code, is inherently illegitimate, or is otherwise per se unlawful. Instead, the Supreme Court has used the Entrapment Doctrine—which sifts people who were not predisposed to commit a crime from the ones who are ready, willing, and able to do so—to ensure that undercover operations do not ensnare innocent parties.[125] In fact, the Court has held that when government officials authorize a law enforcement officer—or anyone else for that matter, such as an informant or member of the public—to engage in particular conduct, the government cannot later prosecute that officer for committing that crime.[126] It could be argued that, in some circumstances, the difference between an *ex ante* authorization to commit a crime for which the defendant is immune from prosecution and an *ex ante* pardon for the future commission of that crime is like the difference between dusk and twilight. Regardless of how

125. *See, e.g.*, Jacobson v. United States, 503 U.S. 540 (1992); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963); Sherman v. United States, 356 U.S. 369 (1958). The lower federal courts also have not held this practice unlawful. *See, e.g.*, United States v. Murphy, 642 F.2d 699, 700 (2d Cir. 1980) (Abscam undercover operation); United States v. Myers, 635 F.2d 932, 937–39 (2d Cir. 1980) (same); United States v. Jannotti, 729 F.2d 213, 223–26 (3d Cir. 1984) (same).

126. *See, e.g.*, United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 673–74 (1973); Cox v. Louisiana, 379 U.S. 559, 569–73 (1965).

that issue is resolved, the use of undercover law enforcement personnel does not amount to the "suspension" of the law for purposes of the Take Care Clause.

D. Pardons and Enforcement of the Law

Whatever discretion, from very narrow to very broad, a President might enjoy to enforce the law, a President can issue category-wide pardons without violating the Take Care Clause. Several factors compel that conclusion.

The seventeenth-century suspension controversy arose because the Stuart kings claimed to possess an unwritten, inherent, absolute right to suspend the operation of an act of Parliament. Parliament prevailed in that dispute by obtaining the agreement of William and Mary not to suspend a law "without consent of Parliament," as the English Bill of Rights of 1689 put it.[127] Parliament thereby adopted in concrete form the principle that the Crown *may* suspend the law *if* Parliament has authorized him or her to do so by a positive law it has passed. That is critical. The Pardon Clause *is* precisely the type of express affirmative authority to relieve offenders of the consequences of their convictions contemplated by the English Bill of Rights. The only difference is that the authority comes from the Constitution rather than an act of Congress. That difference, however, is immaterial. As the Supreme Court explained in *Schick v. Reed*, "the language" of the Pardon Clause and "the unbroken practice since 1790" makes it clear that "the pardoning power is an enumerated power of the Constitution" and any limitations on the authority it vests in the President "must be found in the Constitution itself."[128]

Does the Take Care Clause limit the Pardon Clause to case-by-case clemency? No; far from it. As explained above, that clause does not contain the term "suspension," even though the Framers used that language elsewhere in the document. Even if the clause imposes a fiduciary responsibility on the President not to suspend the law,[129] the Pardon Clause is an express textual "consent" by the Framers for a President to grant mercy as he sees fit, whether on an individual or category-wide basis. In sum, the Pardon Clause empowers the President to issue clemency on a wholesale-level basis, and the Take Care Clause does not bar him from doing so.[130]

127. *See* English Bill of Rights 1689, *supra* note 80.

128. 419 U.S. 256, 266–67 (1974).

129. *See supra* note 111 and accompanying text.

130. *See* Hamburger, *supra* note 72, at 76 ("This silence about the dispensing power is all the more striking because so many American constitutions specified the location of the pardoning power. The two powers were identical, in that they both relied on non obstante clauses, except that whereas one dispensed with a statute before it was violated, the other dispensed with it after it was violated. This difference, however, was profound, and thus while the dispensing power perished as a dangerous exercise of absolutism, the pardoning power thrived as a mechanism for mercy.") (footnote omitted); Calabresi & Prakash, *supra* note 83, at 641 n.444.

III. The Reasonableness of Wholesale-Level Clemency

Concluding that wholesale-level clemency is constitutional does not end the inquiry. The question remains when, if at all, wholesale-level clemency is a sensible option. There is no rule that governs how to make that decision, but there are some scenarios in which that approach is optimal.

One scenario would be present when there is a fundamental, widespread substantive or procedural defect in the criminal law or process that eliminates our confidence that only the legally guilty have, in fact, been convicted. The most obvious case occurs where the statute underlying a charge and conviction is later held unconstitutional.[131] For example, Thomas Jefferson pardoned people convicted under the Alien and Sedition Acts[132] because he believed that those laws were an unconstitutional restriction on speech.[133] Recently, the Supreme Court has struck down acts of Congress on the ground that they were unconstitutionally vague.[134] If a person convicted of violating one of those acts does not have an available judicial remedy on direct appeal or habeas corpus,[135] a President could—and should—pardon everyone who was convicted under that law.[136] An unconstitutional statute has no legal effect and, therefore, cannot justify a criminal conviction or punishment. Any such law is tantamount to having no law at all.[137] In theory, that scenario also could arise where there is a fundamental procedural defect in the trial process.

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131. *See* Larkin, *supra* note 13, at 35–36.

132. *See, e.g.*, Sedition Act, ch. 73, 1 Stat. 596 (1798). Colloquially known as the Sedition Act, Section 2 made it a crime, punishable by a $2,000 fine and two years confinement, for anyone (inter alia) to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with the intent to defame" one of them, "to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States, or to stir up sedition within the United States . . . ."

133. Love, *Twilight*, *supra* note 23, at 1174 n.17.

134. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2323 (2019); Johnson v. United States, 576 U.S. 591, 604 (2015).

135. The latter remedy is available only to someone "in custody." *See* 28 U.S.C. § 2241(c)(1); Munaf v. Green, 553 U.S. 674, 686 (2008) ("An individual is held 'in custody' by the United States when the United States official charged with his detention has 'the power to produce' him.") (quoting Wales v. Whitney, 114 U.S. 564, 574 (1885)).

136. That includes people who pleaded guilty to violating an unconstitutional statute. A person could be "legally" innocent even if he entered a guilty plea. A guilty plea ordinarily concedes the facts charged against the accused but not the constitutionality of the government's criminal prosecution. *See* Class v. United States, 138 S. Ct. 798, 805 (2018) (ruling that a guilty plea does not bar a defendant from challenging the constitutionality of the underlying statute creating the offense of conviction); Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (ruling that a guilty plea does not waive a Double Jeopardy Clause claim raising the claim that "the charge is one which the State may not constitutionally prosecute"). *See generally* Larkin, *supra* note 13, at 36 & n.95.

137. United States v. Davis, 139 S. Ct. 2319, 2323 (2019) ("In our constitutional order, a vague law is no law at all."); Norton v. Shelby Cnty., 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."). That conclusion follows from the Rule of Legality, the principle that no one can be convicted of com-

That category, however, assuming that it exists at all today, would be vanishingly small. The criminal trial has not fundamentally changed over the last sixty years, and during that time the Supreme Court rectified whatever serious constitutional defects it found.[138] The errors that occur today are due to the misapplication of sometimes uncertain law by government officials, not the emergence of a latent, unseen defect in the criminal justice process.

A closely related category of cases exists where the federal government has persuaded the lower federal courts to adopt the Justice Department's expansive reach of a federal criminal statute, but the Supreme Court later rejects that interpretation.[139] On numerous occasions over the last three-plus decades, the Supreme Court has rejected the department's efforts to interpret federal criminal laws to apply to conduct that, however unseemly or tawdry it might be, is not squarely and clearly within the average everyday interpretation of the relevant statute.[140] There, too, if individuals cannot obtain relief in court, the President should pardon anyone who can establish that he or she was convicted under the lower courts' mistakenly broad construction of a criminal statute that the Supreme Court later rejected.

The next logical step in that series would be a set of cases where the President concludes that anyone convicted of a certain crime, while "legally guilty," is nevertheless not "morally guilty." The Reverend Martin Luther King, Jr., described one instance of those cases in his letter from a Birmingham Jail: viz., the conviction of someone for violating "a code that is out of

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mitting a crime without a pre-existing law prohibiting that conduct. *See, e.g.*, Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937). *See generally* Larkin, *supra* note 13, at 35 & nn.92–93.

138. Most such defects were identified and cured long ago. *See* Larkin, *supra* note 66, at 679–84 (discussing the Supreme Court's expansion of the types of rights that a criminal defendant could raise before or at trial). It is unlikely that the Court will find additional ones. *See* Edwards v. Vanoy, 141 S. Ct. 1547, 1556–60 (2021) (ruling that "no new rules of criminal procedure can satisfy the watershed exception" to *Teague v. Lane*, 489 U.S. 288 (1989), allowing a new rule to be applied retroactively on federal habeas corpus). In all likelihood, their existence is like that of the Loch Ness Monster or Bigfoot—often claimed to have been seen but never proven to exist.

139. *See* Larkin, *supra* note 13, at 35–36.

140. *See, e.g.*, United States v. Taylor, 142 S. Ct. 2015 (2022); Kelly v. United States, 140 S. Ct. 1565 (2020); Rehaif v. United States, 139 S. Ct. 2191 (2019); McDonnell v. United States, 579 U.S. 550 (2016); Yates v. United States, 574 U.S. 528 (2015); Sekhar v. United States, 570 U.S. 729 (2013); Bond v. United States, 572 U.S. 844 (2014); Cleveland v. United States, 531 U.S. 12 (2000); Jones v. United States, 529 U.S. 848 (2000); United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999); Bailey v. United States, 516 U.S. 137 (1995); McNally v. United States, 483 U.S. 350 (1987). That error-correction process never seems to end. *See* Transcript of Oral Argument, Percoco v. United States, 142 S. Ct. 2901 (2022) (No. 21-1158) (raising the issue whether a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decision-making, owes a fiduciary duty to the general public such that he can be convicted of honest-services fraud).

harmony with the moral law," like the Black Codes during Segregation.[141] I have argued that another category would be strict liability crimes.[142] The rationale is that strict liability crimes are at war with a fundamental principle of Anglo-American criminal law: namely, "*Actus non facit reum nisi mens sit rea*" (or, for readers who lacked the benefits of a classical education, a crime consists of "a vicious will" and "an unlawful act consequent upon such vicious will.").[143]

Yet another scenario would arise when a President concludes that clemency is necessary to calm the nation after a period of intense internal stress, perhaps even rebellion. That can happen in an individual case. President Ford pardoned Richard Nixon for any and all crimes the latter might have committed in connection with Watergate.[144] But it more commonly arises when there has been a period of large-scale turmoil that has riven the nation. As noted above, a handful of Presidents—such as Washington, Buchanan, Lincoln, Johnson, Truman, Ford, and Carter—used amnesties to try to reconcile segments of the nation who sometimes have violently disagreed with each other or with a federal policy.[145] As the only national official elected by the nation, the President occupies a unique position to forgive transgressions on its behalf. Only he can say, "On behalf of the people of the United States, I forgive you. Go, and sin no more."[146]

Making clemency judgments at the wholesale level also enables a President to avoid problems that will arise whenever he steps out of the role as the nation's chief executive and tries to become a second sentencing judge. President Barack Obama made that mistake in his Clemency Initiative 2014.[147] Believing that the broadly written federal drug laws imposed unduly severe sentences on small-scale players in the drug trade, particu-

141. *See* MARTIN LUTHER KING, JR., LETTER FROM A BIRMINGHAM JAIL, STAN. UNIV. RSCH. & EDUC. INST., http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf (last viewed Jan. 22, 2021); Larkin, *supra* note 13, at 36–37, n.96.

142. Larkin, *supra* note 13, at 38–43; Paul J. Larkin, Jr., *Mistakes and Justice—Using the Pardon Power to Remedy a Mistake of Law*, 15 GEO. J.L. & PUB. POL'Y 651 (2017).

143. Larkin, *supra* note 13, at 38.

144. Proclamation No. 4311, 39 Fed. Reg. 32601 (Sept. 10, 1974).

145. *See supra* notes 24–31 and accompanying text.

146. *John* 8:10–11 (King James) ("When Jesus had lifted himself up, and saw none but the woman, he said unto her, Woman, where are those thine accusers? Hath no man condemned thee? She said, No man, Lord. And Jesus said unto her, Neither do I condemn thee: Go, and sin no more."); *see* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 51 (1989) ("[P]ardons are a better signal than an armistice agreement to show that a war is truly over and that peace is restored."); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 50 (1998) ("[A]n executive pardon would allow the President to heal the country in times of civil unrest, thereby protecting national security.") (footnote omitted).

147. *See, e.g.*, Paul J. Larkin, Jr., *"A Day Late and a Dollar Short"—President Obama's Clemency Initiative 2014*, 16 GEO. J.L. & PUB. POL'Y 147 (2018) [hereafter Larkin, *A Day Late*]; Paul J. Larkin, Jr., *Delegating Clemency*, 29 FED. SENT. R. 267 (2017) [hereafter Larkin, *Delegating Clemency*]. For a thorough and excellent discussion of the numerous steps in the federal clemency process between an offender's request for clemency and a President's receipt of a rec-

larly ones who had trafficked in "crack" cocaine,[148] Obama directed U.S. Attorney General Eric Holder to devise a large-scale program that would enable him to commute the sentences of deserving offenders.[149] Obama wound up commuting the sentences imposed on 1,175 offenders.[150] The problem, however, is that Obama likely delegated his decision-making authority to whatever lower-level prosecutor was asked to review an applicant's file.[151] That was not what the Framers had in mind,[152] and it is not

ommended action, see Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 477–84 (2017).

148. The Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841 (amended 2010 & 2018), required federal district courts to impose the same lengthy sentences on small-scale crack cocaine dealers as on large-scale powdered cocaine traffickers by triggering the mandatory minimum sentences for the former at 100 times less than the corresponding trigger for the latter. *See* Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241, 241–43, 242 n.3 (2014). The rationale was that crack was thought to be more addictive, debilitating, and dangerous. *See, e.g.*, United States v. Thompson, 27 F.3d 671, 678, n.3 (D.C. Cir. 1974). The lengthy sentences mandated by the crack cocaine provisions of the Anti-Drug Abuse Act of 1986, however, became quite controversial for several reasons:

> Given the demand for crack cocaine, the segregated residential housing patterns in urban areas, and the relative ease of enforcing the drug laws against crack dealers operating in 'open air drug markets,' thousands of black crack cocaine traffickers ended up being arrested, convicted, and sentenced under the 1986 law to lengthy terms of imprisonment."

Larkin, *A Day Late*, *supra* note 147, at 149–50, 140 n.11.

149. For descriptions, analyses, and criticisms of the Obama clemency initiative, see Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 2–4 (2015); Larkin, *A Day Late*, supra note 147; Larkin, *Delegating Clemency*, *supra* note 147; Bill Keller, *The Bureaucracy of Mercy*, MARSHALL PROJECT (Dec. 14, 2015), https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.z1dz5VdVx [https://perma.cc/4KQZ-MLHD].

150. Larkin, *Delegating Clemency*, *supra* note 147, at 267.

151. The data justifies that inference:

> Obama acted on more than 27,000 clemency petitions during his presidency. In how many cases did he make what amounts to a resentencing decision himself, rather than delegate those decisions to others down the clemency food chain? Consider the clemency data for October 2016 through January 20, 2017. Obama granted 1043 commutations, denied 4864 commutation petitions, and granted 221 pardons. That amounts to 6128 clemency decisions, approximately 1532 petitions per month or 51 each day. If you count just the grants, that comes to about 9.3 each day. Does anyone really think that Obama read 9 clemency memoranda, let alone *files*, each day during that four-month period? I doubt it. Of course, maybe a four-month period is too short. If so, let's put the starting date back to January 2016, when a new lawyer became the Pardon Attorney. The number of days to make 6128 clemency decisions now becomes 385, which reduces the daily number to just below 16, or 2.7 if we count only commutation cases. Does anyone really think that Obama read 2 to 3 clemency memoranda (or files) each day during that near thirteen-month period, let alone 16? I doubt that too.

Larkin, *Delegating Clemency*, *supra* note 147, at 267 (emphasis in original). The alternative of having the President act like a Resentencer-in-Chief is a waste of the President's valuable time. Larkin, *Delegating Clemency*, *supra* note 147, at 268 ("The resentencing process was also a mistake even if we assume that Obama himself made thousands of commutation decisions based on his independent review. For a president to become Resentencer-in-Chief is a most unwise use of his limited, invaluable time. The number of pressing issues for the president to decide dealing with foreign or domestic policy (putting criminal justice issues aside for the moment) is ever increasing, as is the number of agencies and personnel he must supervise. Either of those subjects alone would exhaust the time that even the most indefatigable chief executive could devote to the nation's business. If Obama were right that numerous aspects of our criminal justice system are

the way to run this railroad.[153] The amnesty power enables a President to pardon or release an offender early by making a categorical judgment that a class of offenders should be excused from their offense or, in the case of a commutation, should be imprisoned for no more than a fixed term of years. Any additional reconsideration of a particular offender's sentence should be left to district court judges, who make sentencing decisions for a living.[154]

That being said, most Presidents find that clemency is all risk and no reward or that winnowing the wheat from the chaff does not justify the time and expense that he and others must spend.[155] An individual pardon "con-

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deathly in need of repair, a president could spend his entire day discovering what is wrong, learning how to fix those defects, explaining to the public why our system has to be overhauled, and working with Congress to restructure and underwrite how we investigate, prosecute, and defend criminal accusations. To also take on the job of resentencing every offender in a particular category of crimes, even where he believes that there are a massive number of prisoners subject to disproportionate, unjust terms of imprisonment, would inevitably lead to one of two outcomes: either the president will get little else done for a significant period of each day, or he will delegate decision making to others. My bet is that Obama chose the latter route. It is likely that he let others—people unseen by and unknown to the public—decide how a very large number of prisoners should be resentenced. But if he did choose the former, he squandered time that he should have spent on other matters.").

152. Larkin, *Delegating Clemency*, *supra* note 147, at 268 ("The Framers granted the president the power to grant clemency in Article II because they believed that one person, the nation's chief executive, should be responsible for making that decision. The president's clemency power is found in the same part of Article II as his Commander-in-Chief power and the power to demand opinions from his principal lieutenants, neither of which is subject to review by Congress or any other official. By contrast, the president's powers to make treaties and to appoint ambassadors, consuls, and other federal officers are subject to the 'advice and consent' of the Senate. That is important because it signals that *he* is to make those decisions, not someone else.") (emphasis in original).

153. Larkin, *Delegating Clemency*, *supra* note 147, at 268 ("The flip side of the fact that the president's clemency power is his *alone* to exercise is that it is *his* alone to exercise. *The president* must make that decision—not the Attorney General, not the Deputy Attorney General (to whom Attorney General Griffin Bell delegated final decision-making responsibility for the Justice Department), not the Pardon Attorney, not a U.S. Attorney, and not an Assistant U.S. Attorney. It is difficult to believe that the Framers would have approved a president's decision to delegate his Commander-in-Chief power to a subordinate civilian official or military officer. If the nation were to prosecute a war, the one person responsible for its outcome was to be the one person whom the entire nation elected to office. If so, the Framers must have decided to treat the president's clemency power in the same manner because it is found in the same section and paragraph of Article II. If the nation were to admit a mistake or bestow mercy, it should be the one person who could speak for the nation. And if that is true, then the president cannot delegate his clemency power to someone below him in the chain-of-command. It may be the case, however, that Obama did just that.") (emphasis in original).

154. *See* Larkin, *A Day Late*, *supra* note 147, at 157.

155. *See* CROUCH, *supra* note 2, at 5 ("Pardons rarely provide any political benefit to presidents, and they always involve some risk to their political capital . . . . The current political environment rewards—or at least does not punish—a president who is sparing with the pardon power."); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 856 (2016) ("Presidents likely view clemency as all cost and no benefit."). History has looked favorably on President Ford's decision to pardon Richard Nixon, but doing so likely cost Ford the 1976 presidential election. *See* DODDS, *supra* note 24, at 8; MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 119–20 (2019); BARRY WERTH, THIRTY-ONE DAYS: GERALD FORD, THE NIXON PARDON, AND A GOVERNMENT IN CRISIS (2007) ("The [Washington] Post's Bob Woodward, after

stitutes a departure from the norm" and, unless justified, "can therefore seem to be an inappropriate exception to the established rules of criminal justice," making it "a wrong that compounds the initial wrong to which it applies."[156] Some Presidents have abused their pardon power or have failed to justify its use to the public.[157] A mass pardon multiplies the political risks, potential damage, and longstanding ignominy.[158] There is also a cost to the nation whenever the public believes that a President has acted in bad faith and comes to treat his actions with disrespect or derision, a cost that is paid in the coin of lost respect for the rule of law.[159] Individuals find themselves less willing to assist law enforcement whenever they find that the government has pursued an ignoble undertaking, which enables some offenders to pillage again.[160] People who lose respect for the law because of presidential actions done in bad faith or for their own cheap political or personal benefit then find themselves less willing, as Justice Oliver Wendall Holmes once put it, to "turn square corners when they deal with the Government."[161] A result is that they commit crimes they would not otherwise have dreamed of doing.

A President could also believe that the federal clemency process needs to be reformed before he can trust the judgments of the people who review the clemency petitions that reach his desk. Numerous commentators (myself included) have argued that the current system is biased against awarding relief because the same entity, the Department of Justice, manages all federal prosecutions and all clemency applications.[162] Elsewhere in the law that would be deemed an actual or apparent conflict of interest because few

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interviewing Ford in 1998 concluded: 'If Ford mishandled some of the details and disclosures, he got the overall absolutely right—the pardon was necessary for the nation.' "); Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 887 (1992).

156. DODDS, *supra* note 24, at 8.

157. *See, e.g.*, Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010); Larkin, *supra* note 8, at 764–66, n.3 (discussing abuses by former Presidents Bill Clinton and Donald Trump).

158. *See* DODDS, *supra* note 24, at 8.

159. Social science suggests that people generally comply with laws that they respect, rather than because of their fear of being caught and punished. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); PETER C. YEAGER, THE LIMITS OF LAW, THE PUBLIC REGULATION OF PRIVATE POLLUTION 9 (1991) ("As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.").

160. Witness the outrage that the public voices whenever a President grants clemency to family members, friends, cronies, and political supporters or contributors. *See* Paul J. Larkin, Jr., *The Legality of Presidential Self-Pardons*, 44 HARV. J.L. & PUB. POL'Y 763, 764–66 & nn.3–10 (2021).

161. Rock Island, A. & L.R. Co. v. United States, 254 U.S. 141, 143 (1920).

162. *See, e.g.*, Alschuler, *supra* note 157, at 1164; Barkow & Osler, *supra* note 149, at 13–15, 18–19; Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardon Power from the King*, 69 TEX. L. REV. 569, 622 (1991); Larkin, *supra* note 155, at 900–03; Love, *Twilight*, *supra* note 23, at 1193–95; *It's Time to Overhaul Clemency*, N.Y. TIMES (Aug. 18, 2014), https://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html. The appropriate remedy for the current actual or potential conflict of interest is beyond the scope of this Article.

people are willing to admit to having made a mistake.[163] A President has only a limited amount of time that he will devote to clemency, particularly because it is not the type of issue that will move many voters to re-elect him. A President, therefore, could decide to spend that time revising the entire process rather than continue to stumble through the one that now exists.

Finally, a President could also make a good faith but seriously mistaken judgment through a wholesale-level grant of clemency. No President would like to be known for wearing a dunce cap for any one particular mistaken grant of clemency.[164] If a category-wide grant of relief were to backfire, the embarrassment—and political cost—would be multiplied considerably. Plus, a President might believe that category-wide relief is sensible only in narrow circumstances and is too time-intensive to justify the results. As a result, there are a number of factors that could persuade some Presidents to forego that practice entirely. Yet, that is a policy or political judgment for each President; it is not a legal constraint. The law allows the President to take a chance at the wholesale level.

IV. Conclusion

The Article II Pardon Clause authorizes the President to grant clemency with few restrictions on who may receive relief. Throughout our history, Presidents have believed that they may grant amnesties to broadly defined categories of offenders, and the Supreme Court has blessed that practice. A slew of contemporary scholarship, however, has re-examined the meaning of the Article II Take Care Clause, and many scholars have read it to function, not principally as a grant of authority, but as the imposition of a duty on the President to enforce the law. The question arises whether a category-wide grant of clemency would violate that obligation. The answer is, "No." Neither the text of the Pardon Clause nor that of the

163. *See, e.g.*, Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. Crim. L. & Criminology 593, 606 (2013) ("[C]areer prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues.").

164. *See, e.g.*, Marie Gottschalk, Caught: The Prison State and the Lockdown of American Politics 189 (2015) ("[Former Arkansas Governor Mike] Huckabee's commutation and pardon record came under national scrutiny and spurred a spate of political obituaries after a man he had granted clemency to in 2000 killed four police officers in Tacoma, Washington, in 2009."); Timothy Curtin, Note, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing it*, 15 Elder L.J. 473, 499–500 (2007) ("Stories like that reported by Professor Edith Flynn of Northeastern University do nothing to help the profile of early-release programs. In a radio interview, Flynn related the experience of a Michigan inmate, a double amputee aged sixty-five or sixty-six, who was confined to a wheelchair. Within three weeks of securing a compassionate release, this inmate allegedly wheeled himself into a bank armed with a sawed-off shotgun and robbed it alongside two accomplices. He was soon caught and returned to prison for life. While this scenario sounds like a Hollywood heist movie, the damage of such an occurrence to compassionate release programs is all too real.") (footnotes omitted).

Take Care Clause imposes any such limitation, and the history of their adoption does not suggest that the latter limits the former in a way that forbids large-scale amnesties or commutations. Whatever individual Presidents may think of the utility or desirability of wholesale-level clemency, the law does not forbid them from granting it.